(a) section 332(c)(1)(B), which obligates LECs to interconnect with wireless providers "pursuant to the provisions of section 201;"[1424] (b) section 2(b), which provides that the Act should not be construed to apply or to give the Commission jurisdiction with respect to charges in connection with intrastate communication service by radio "[e]xcept as provided in . . . section 332;"[1425] and (c) the preemptive language in section 332(c)(3)(A), which prohibits states from regulating the entry of or the rates charged by CMRS providers.[1426] The D.C. Circuit likewise recently acknowledged the Commission's authority in this regard, observing that the Commission historically had elected to leave intrastate access rates imposed on CMRS providers to state regulation, and recognizing: "That the FCC *can* issue guidance does not mean it must do so."[1427] Accordingly, we conclude that we have separate authority under sections 201 and 332(c) to establish rules governing the exchange of both intrastate and interstate traffic between LECs and CMRS carriers.

780. *Section 254(k)*. We also reject the claims of some commenters that a bill-and-keep approach would violate section 254(k) of the Act.[1428] Section 254(k) of the Act states that a telecommunications carrier "may not use services that are not competitive to subsidize services that are subject to competition," and that the Commission "shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services."[1429] Some parties express concern that, under a bill-and-keep regime, retail voice telephone services subject to universal service support would bear more than "a reasonable share of the joint and common costs."[1430]

781. The United States Court of Appeals for the Eighth Circuit previously considered and rejected similar arguments concerning the reallocation of loop costs between end users and IXCs.[1431] Specifically, the court considered whether the recovery of joint and common costs must be borne mutually by end-users and by IXCs, and whether a shift in cost recovery from IXCs to end-users violated section 254(k) of the Act.[1432] As to the first provision of section 254(k), the court found that "[s]ection 254(k) was not designed to regulate the apportionment of loop costs between end-users and IXCs because this allocation does not involve improperly shifting costs from a competitive to a non-competitive

[1424] 47 U.S.C. § 332(c)(1)(B).

[1425] *Id.* § 152(b).

[1426] *Id.* § 332(c)(3)(A).

[1427] *MetroPCS California, LLC v. FCC*, 644 F.3d 410, 414 (D.C. Cir. 2011) (*MetroPCS California v. FCC*) (emphasis in original). *See also id.* (noting the Commission's position in the *North County v. MetroPCS* decision "that '[w]hether to depart so substantially from such long-standing and significant Commission precedent [and to proceed to regulate intrastate rates on this basis] is a complex question better suited to a more general rulemaking proceeding'"). We find this rulemaking proceeding the appropriate context to address this issue.

[1428] *See, e.g.,* Nebraska Rural Companies *USF/ICC Transformation NPRM* Comments at 31; State Members *USF/ICC Transformation NPRM* Comments at 150; SureWest *USF/ICC Transformation NPRM* Reply at 8.

[1429] 47 U.S.C. § 254(k).

[1430] For example, commenters contend that "long distance toll carriers and other service providers, along with their end users, benefit from the utilization of expensive RLEC networks to originate, transport and terminate calls" and that bill-and-keep "would prohibit a reasonable allocation of costs to these other carriers that reflects a rational measure of their use of RLEC networks." Rural Associations *USF/ICC Transformation NPRM* Comments at 23-24. *See also* Nebraska Rural Companies *USF/ICC Transformation NPRM* Comments at 31.

[1431] *See Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 559 (8^{th} Cir. 1998).

[1432] *See id.*

service," even if "a LEC allocates all of its local loop costs to the end-user."[1433] Further, the court disagreed that an increase in the SLC price cap violates the second part of 254(k) by causing services included in the definition of universal service to bear more than a reasonable share of the joint and common costs of facilities used to provide those services. The court explained that the "SLC is a method of recovering loop costs, not an allocation of costs between supported and unsupported services"[1434] in violation of section 254(k). We concur with the Eighth Circuit's analysis and conclude that it applies equally in this context. A bill-and-keep framework resolves whether a carrier will recover its costs from its end users or from other carriers; the underlying service whose costs are being recovered is the same, however, so no costs are being improperly shifted between competitive and non-competitive services for purposes of section 254(k).[1435]

3. Other Proposals Considered

a. Low Uniform Per-Minute Rate

782. Several parties have suggested that the Commission adopt a low uniform per-minute access charge rather than a bill-and-keep approach.[1436] For example, some stakeholders propose an end state of $0.0007 for terminating switched and certain terminating transport elements.[1437] Although we recognize that a low uniform rate would result in substantially reduced intercarrier compensation rates, we find several difficulties with this approach.

[1433] *Id.*

[1434] *Id.*

[1435] We find the bill-and-keep methodology consistent with section 254(k). As to the first provision of section 254(k), we find this approach more consistent with the statute than the previous regime. Access charges were designed to include a subsidy of the local network. *See, e.g., 2008 Order and USF/ICC FNPRM*, 24 FCC Rcd at 6569-70, 6574-75, App. A at paras. 165-66, 173-75; *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4706, 4722, paras. 501, 540. Given the historical under-allocation of costs to non-regulated services that use the local network, the use of access charges—which are not subject to competition—to subsidize the local network would, in effect, subsidize such services, which can be subject to competition. *See USF/ICC Transformation NPRM*, 26 FCC Rcd at 4573, 4732, paras. 52, 569. *See also, e.g., CALLS Order*, 15 FCC Rcd at 13001, para. 98 ("To date, we are not aware of any incumbent LECs that have allocated any loop costs to ADSL services."). *See Petition of Qwest Corporation For Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8664, para. 79 & n.238 (2010). *See, e.g., Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, WC Docket Nos. 02-112, 06-120, CC Docket No. 00-175, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16460-61, para. 39 (2007) (finding that AT&T and Verizon lack classical market power with respect to certain mass market services, including bundled local and long distance voice telephone service); *id.* at 16466, para. 49 (concluding the same with respect to certain retail enterprise services). Further, as to the second provision of section 254(k), we explain above why we conclude that bill-and-keep best advances the relevant policy considerations. To the extent that our adoption of bill-and-keep results in an additional allocation of joint and common costs to services supported by universal service, we find that to be reasonable based on those policy considerations. *See* 47 U.S.C. § 254(k) (directing the Commission "to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.").

[1436] *See, e.g.,* Verizon *USF/ICC Transformation NPRM* Comments at 7-13; Level 3 *USF/ICC Transformation NPRM* Comments at 8-9.

[1437] *See* ABC Plan, Attach 1 at 9.

783. *Relationship to All-IP Networks.* We believe that an end point of a low uniform per-minute rate perpetuates the use of TDM networks, whereas our goal is to facilitate the transition to an all-IP network and to promote IP-to-IP interconnection.[1438] Some commenters claim that the existing intercarrier compensation regime is consistent with investment in IP networks, citing LECs' investments in softswitches for example,[1439] but they do not rebut the conclusion that *per minute* charges are inconsistent with the exchange of traffic on an IP-to-IP basis.[1440] Nor do they cite evidence that carriers that historically have relied heavily on per-minute intercarrier compensation charges—typically incumbent LECs—have nonetheless interconnected on an IP-to-IP basis.[1441] The record affirms the *USF/ICC Transformation NPRM*'s suggestion that per-minute intercarrier compensation charges are an impediment to IP-to-IP interconnection.[1442]

784. *Use in Agreements.* Some commenters observe that members of the industry have entered into negotiated agreements for the exchange of traffic at a $0.0007 rate.[1443] But selected parties' use of a rate in interconnection agreements[1444] does not necessarily support enacting that rate for an entire industry.[1445] The Commission has recognized that the reasonableness of a negotiated rate cannot be

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[1438] *See supra* Section XVII.P.

[1439] *See, e.g.*, COMPTEL *USF/ICC Transformation NPRM* Comments at 4-5; PAETEC et al. *USF/ICC Transformation NPRM* Comments at 6-7, n. 16.

[1440] *See, e.g.*, Letter from Ad Hoc Telecommunications Users Committee et al., to Julius Genachowski, Chairman, FCC, et al., WC Docket Nos. 10-90, 07-135, 05-337, 03-109, 06-122; GN Docket No. 09-51; CC Docket Nos. 01-92, at 9 (filed Aug. 18, 2011) (Ad Hoc et al. Aug. 18, 2011 *Ex Parte* Letter) ("IP-to-IP traffic today is often exchanged based upon capacity or ports, not per-minute as is the case with circuit-switched TDM traffic. IP network charges are generally driven by peak hour network utilization levels, which are poorly reflected by per-minute charges.").

[1441] Rather, the record reveals that incumbent LECs generally have been reluctant to interconnect on an IP-to-IP basis. *See* Global Crossing *USF/ICC Transformation NPRM* Comments at 7; XO *USF/ICC Transformation NPRM* Reply at 12-13.

[1442] *See, e.g.*, XO *USF/ICC Transformation NPRM* Comments at 22.

[1443] "The $0.0007 per minute rate is also consistent with the rates contained in certain recently negotiated agreements between ILECs and CLECs. For example, Verizon recently entered into a commercial agreement with Bandwidth.com for the exchange of VoIP traffic at $0.0007 per minute." *See* ABC Plan, Attach. 5 at pp. 34-35; Verizon *USF/ICC Transformation NPRM* Comments at 12-13.

[1444] Some commenters also question the extent to which the $0.0007 rate actually is employed in voluntarily negotiated agreements. *See, e.g.*, Cablevision and Charter Section XV Reply at 8 ("The fact that the market has been almost universally *unwilling* to provide Verizon with agreements at its preferred rate (with the exception of one small provider that serves PBX customers) is the reason it is asking the Commission to impose such a rate, and should readily dispel any contention that $0.0007 represents a rate for the exchange of IP-originated or IP terminated traffic set by the 'market.'") (emphasis in original).

[1445] A number of commenters argue that $0.0007 cannot be enacted for the entire industry because no cost basis has been offered in the record to justify the rate. Rather, some commenters have provided data taking various approaches to estimating cost that yield different rates higher than $0.0007 per minute. *See* Letter from James Bradford Ramsay, Counsel to the State Members of the Federal State Joint Board on Universal Service, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, at 2 (filed July 14, 2011) ("there is NO record evidence – no empirical data – no actual cost studies – to support imposing a single industry-wide $0.0007 rate as compensatory") (emphasis in original). Other commenters believe that the $0.0007 rate is higher than the cost of termination under other measures, especially as more and more providers move to IP technology. *See* Sprint Section XV Comments at 18, n.32 ("The $.0007 rate
(continued…)

evaluated in isolation, but must be considered in the context of the agreement as a whole.[1446] The suggestion to take a rate that appears in some interconnection agreements[1447] in isolation from the other rates, terms, and conditions in that agreement and apply it more broadly therefore conflicts with the Commission's policies regarding interconnection agreements.[1448]

785. For these reasons, we decline to adopt a positive per-minute rate as the end point to reform though we implement $0.0007 per-minute as part of the transition to bill-and-keep, as described below.[1449]

b. Flat-Rated Charges

786. The *USF/ICC Transformation NPRM* also sought comment on the use of flat-rated charges as an alternative pricing methodology.[1450] The possible use of flat-rated charges is a hold over suggestion made prior to the explosion of bundled offerings and the decline of per-minute long-distance calling rates. This approach received limited support in the record, and we decline to adopt it.[1451] Flat-rated charges would continue the present opaque system where customers of one network subsidize customers of another,[1452] and would in all likelihood, result in arbitrary prices being assigned to different interconnecting carriers. Considerable questions remain as to how flat-rated charges would be calculated and structured. Given the potential variability of these rates, we believe such charges would fail to

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was computed some 12 years ago, and Sprint believes that the economic cost of terminating a minute today, particularly using current IP technology, is even lower.").

[1446] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245; GN Docket No. 09-51, 26 FCC Rcd at 5336-37 paras. 217-19. The fact that an agreement was negotiated among companies with roughly comparable bargaining power may be a good reason to judge that agreement as establishing just and reasonable rates, terms and conditions between those two parties. *See id.* at 5334-36, paras. 215-16.

[1447] In the *ISP Remand Order*, the $0.0007 rate was selected as a transitional rate on the glide path to the recovery of costs from end-users based on evidence that some carriers had agreed to this rate in interconnection agreement negotiations. *See ISP Remand Order*, 16 FCC Rcd at 9190-91, para. 85. In the *2008 Order and ICC/USF FNPRM*, the Commission decided to "maintain the $.0007 cap and the mirroring rule pursuant to its section 201 authority. These rules shall remain in place until we adopt more comprehensive intercarrier compensation reform." *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6489 para. 29.

[1448] In particular, the Commission replaced its previous "pick and choose" rule that permitted carriers to opt-in to isolated provisions of existing interconnection agreements with the "all or nothing" rule that required carriers to opt-in to interconnection agreements as a whole. *See generally, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order, 19 FCC Rcd 13494 (2004); *see also* Letter from James M. Tobin, Counsel for Pac-West, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 01-92; WC Docket No. 99-68, Attach. at 5 (filed Oct. 6, 2008) ("The $0.0007 rate was just one element in negotiated interconnection agreements that, like any negotiation, necessarily involved various tradeoffs in other areas, and has no precedential effect when taken in isolation."); Letter from Thomas Jones, Counsel for twtelecom inc. and One Communications Corp., to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45; WC Docket Nos. 05-337, 99-68, 04-36, Attach., at 3 (filed Oct. 6, 2008).

[1449] *See infra* Section XII.C.

[1450] *See USF/ICC Transformation NPRM*, 26 FCC Rcd at 4719 para. 531.

[1451] *See, e.g.*, COMPTEL *USF/ICC Transformation NPRM* Comments at 34-35; GVNW *USF/ICC Transformation NPRM* Comments at 24.

[1452] *See supra* para. 657.

address the arbitrage and marketplace distortions described above that arise from the fact that intercarrier rates are currently above incremental cost.[1453] Nor would a transition to such flat-rated charges address the marketplace distortions that arise from the differential application of intercarrier compensation rules to different providers and different types of traffic.[1454] To the extent that flat-rated charges were based on something other than per-minute rates, the regulatory and implementation costs of setting the rates could be significant.[1455] Flat-rated charges applied to TDM traffic could also continue to hinder the transition to all-IP networks. We agree that if some carriers require other carriers to convert their IP traffic to TDM to complete a call, "merely substituting a flat-rated intercarrier compensation regime for a per minute system is not going to accelerate the deployment of IP networks or speed the transition away from the circuit-switched PSTN."[1456] We find such approaches less consistent with cost causation principles and the goal of ensuring more appropriate pricing signals to end users than the bill-and-keep methodology we adopt.

c. More Limited Rate Reductions

787. Other parties advocate that the Commission initiate reforms to only the highest intercarrier charges and then reassess whether further reform is necessary. The Rural Associations, for instance, propose that RLEC intrastate switched access rates be reduced to interstate levels by individual carriers at the direction of state commissions in tandem with the creation of a federal restructure mechanism.[1457] Carriers would have access to the restructure mechanism if they make certain service and rate reduction commitments.[1458] We have several concerns with the RLEC Plan: There is no mandate for action, action to reduce non-intrastate rates would be delayed for three to five years, and the Plan would not result in uniformity of rates. We find that such a conservative approach to reform would do little to address the multitude of issues described in the *USF/ICC Transformation NPRM* that plague the current intercarrier compensation systems. Again, we find bill-and-keep to be the best option to accomplish comprehensive intercarrier compensation reform.

B. Federal/State Roles in Implementing Bill-and-Keep

788. We turn now to the transition and implementation issues surrounding our move to a bill-and-keep framework, beginning in this section with the threshold question of respective federal and state roles. In the *USF/ICC Transformation NPRM*, we outlined two possible approaches for working with the states to advance sustainable intercarrier compensation reform, given a uniform, national methodology as the end point for reform.[1459] Under the first approach, the states would set the transition and recovery mechanism for intrastate access charges, while the Commission would do so for interstate charges, including providing universal service support to offset carriers' reduced interstate revenues, as required.[1460] The Commission also sought comment on providing incentives for states to implement their transitions expeditiously, for example by making limited federal universal service funds available to assist with intrastate recovery, while setting a firm backstop for states that failed to act. Under the second approach, the Commission would set the transition path and recovery mechanism for all traffic, including

[1453] *See supra* paras. 662-666.

[1454] *See supra id.*

[1455] *See supra 742*-743.

[1456] COMPTEL *USF/ICC Transformation NPRM* Comments at 35.

[1457] *See* RLEC Plan at 12-22.

[1458] *See id.*

[1459] *See USF/ICC Transformation NPRM*, 26 FCC Rcd at 4721-28, paras. 537-55.

[1460] *See id.*

intrastate calls, while assuming the burden of USF recovery, as necessary, for both interstate and intrastate revenues reduced as a result of reform.[1461]

789. In response, we received proposals supporting both approaches. Some states supported the bifurcated approach in which they would manage the transition and recovery for intrastate rates while the majority of industry stakeholders supported a more predictable, nationally uniform approach.[1462] The State Members of the Federal State Joint Board, meanwhile, submitted an alternative plan under which states would be responsible for reforming intrastate access charges, even as the federal jurisdiction assumed the primary burden for intrastate revenue recovery through SLC increases up to the current SLC caps and explicit support from the federal universal service fund.[1463] In contrast, other stakeholders proposed that the Commission adopt a uniform, national framework for reductions in interstate and intrastate access charges, as well as recovery from the federal jurisdiction.[1464] The *August 3 Public Notice* sought additional comment on these approaches as well as possible modifications.[1465]

790. We now conclude that a uniform, national framework for the transition of intercarrier compensation to bill-and-keep, with an accompanying federal recovery mechanism, best advances our policy goals of accelerating the migration to all IP networks, facilitating IP-to-IP interconnection, and promoting deployment of new broadband networks by providing certainty and predictability to carriers and investors. Although states will not set the transition for intrastate rates under this approach, we do follow the State Member's proposal regarding recovery coming from the federal jurisdiction. Doing so takes a potentially large financial burden away from states. States will also help implement the bill-and-keep methodology: They will continue to oversee the tariffing of intrastate rate reductions during the transition period as well as interconnection negotiations and arbitrations pursuant to sections 251 and 252, and will have responsibility for determining the network "edge" for purposes of bill-and-keep.[1466]

791. Today, intrastate access rates vary widely. In many states, intrastate rates are significantly higher than interstate rates; in others, intrastate and interstate rates are at parity; and in still other states, intrastate access rates are below interstate levels.[1467] The varying rates have created

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[1461] *See id.*

[1462] *See, e.g.*, AT&T *USF/ICC Transformation NPRM* Comments at 31, 38-43 (urging federal framework); CTIA *USF/ICC Transformation NPRM* Comments at 40-42 (same); California Commission *USF/ICC Transformation NPRM* Comments at 19-20 (urging current jurisdictional roles); New York Commission *USF/ICC Transformation NPRM* at 7-12 (same).

[1463] *See* State Members *USF/ICC Transformation NPRM* Comments at 153-55.

[1464] *See* ABC Plan at 11-13; Joint Letter at 2-3.

[1465] *Further Inquiry Into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51, Public Notice, DA 11-1348 at 10-13 (WCB rel. Aug. 3, 2011) (*August 3 PN*). The *August 3 PN* sought comment on the ABC Plan, which proposed for the Commission to unify all rates consistent with the second option from the *USF/ICC Transformation NPRM*. Comment was also sought on an alternative whereby states would act to reform intrastate access during an initial three year period, following which the Commission would bring intrastate traffic under section 251(b)(5), consistent with the first option. *Id.* at 12.

[1466] *See supra* para. 776; *infra* paras. 1321, 1370.

[1467] Letter from Joe A. Douglas, Vice President, Government Relations, NECA, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 80-286, Attach. (filed Dec. 29, 2010) (NECA Dec. 29, 2010 *Ex Parte* Letter) (providing a report showing average intrastate access rates per state for NECA common line 2010 pool members from as low as 1.98 cents per minute to as high as 13.5 cents per minute).

incentives for arbitrage and pervasive competitive distortions within the industry.[1468] Equally important, consumers may not receive adequate price signals to make economically efficient choices because local and long-distance rates do not necessarily reflect the underlying costs of their calls. Depending on their regulatory classification, some carriers charge and collect intercarrier compensation charges, while other carriers do not. A bill-and-keep system will ultimately eliminate the competitive distortions and consumer inequities that arise today when different carriers that use differing technologies (wireline, wireless, VoIP) to perform the same function – complete a call – are subject to different regulatory classifications and requirements.

792. Providing a uniform national transition and recovery framework, to be implemented in partnership with the states, will achieve the benefits of a uniform system and realize the goals of reducing arbitrage and promoting investment in IP networks as quickly as possible. By transitioning all traffic in a coordinated manner, we will minimize opportunities for arbitrage that could be presented by disparate intrastate rates.[1469] For example, our approach will reduce the potential for arbitrage that could result from a widening gap between intrastate and interstate rates if the Commission were to initially reduce interstate rates only.[1470] In addition, a coordinated transition involving both intrastate and interstate traffic will help to align principles of cost causation and provide appropriate pricing signals to end users. Whether completing an interstate or intrastate call, consumers will benefit from a unified system in which arbitrage opportunities that inequitably shift costs among consumers are reduced.

793. By moving in a coordinated manner to address the intercarrier compensation system for all traffic, we will also help to ensure that there is no disruption in the transition to more efficient forms of all IP networks. The record suggests that a "federally managed, geographically neutral" intercarrier compensation regime that eliminates incentives for arbitrage will allow service providers to deploy resources in more productive ways.[1471] In addition, a unified approach for all ICC traffic will help remove obstacles to progress toward all-IP networks where jurisdictional boundaries become less relevant.[1472] In sum, our approach helps to ensure that the intercarrier compensation modernization effort will continue apace without unnecessary delays needed to harmonize disparate state actions.

794. Although several states have sought to reform intrastate access rates, significant challenges remain that could impede our comprehensive reform efforts absent a uniform, national transition.[1473] Under the direction of both state commissions and legislatures, states have taken a variety

[1468] *See, e.g.*, AT&T *USF/ICC Transformation NPRM* Comments at 13; *see also* NASUCA *USF/ICC Transformation NPRM* Comments at 73 (describing a patchwork of rates).

[1469] *See* AT&T *USF/ICC Transformation NPRM* Comments at 13; CBeyond et al. *USF/ICC Transformation NPRM* Comments at 8-9; AT&T et al. *August 3 PN* Reply at 4.

[1470] CBeyond et al. *USF/ICC Transformation NPRM* Comments at 8-9.

[1471] *See* TIA *August 3 PN* Comments at 10; *see also* AT&T *USF/ICC Transformation NPRM* Comments at 14; Google *USF/ICC Transformation NPRM* Comments at 5.

[1472] *See* Google *USF/ICC Transformation NPRM* Comments at 5; Global Crossing *USF/ICC Transformation NPRM* Comments at 6-7; Ad Hoc et al. Aug. 18, 2011 *Ex Parte* Letter, at 2.

[1473] *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4723-24, para. 543 (highlighting efforts of states including Nebraska, Iowa, and Maine); *see also* Alaska Commission *USF/ICC Transformation NPRM* Comments at 26-27; IUB *USF/ICC Transformation NPRM* Comments at 4-5; Kansas Commission April 18 *USF/ICC Transformation NPRM* Comments at 15; Massachusetts DTC *USF/ICC Transformation NPRM* Comments at 19, Attachs. 1 & 2; Michigan Commission *USF/ICC Transformation NPRM* Comments at 10-13; Missouri Commission *USF/ICC Transformation NPRM* Comments at 17; New Jersey Board *USF/ICC Transformation NPRM* Comments at 5; Ohio Commission *USF/ICC Transformation NPRM* Comments at 55-57; Washington Commission *USF/ICC Transformation NPRM* Comments at 8-11; Letter from James Bradford Ramsay, General Counsel, NARUC, to (continued…)

of approaches to reform.[1474] In some states, these efforts have resulted in intrastate access rate levels coming to parity with interstate levels.[1475] In other states, reform has led to reductions in intrastate rate levels, but rates remain above interstate levels.[1476] Although many states may genuinely desire to advance additional reforms, the challenges posed by a state-by-state process would likely result in significant variability and unpredictability of outcomes.[1477] Moreover, some state commissions lack authority to address intrastate access reform,[1478] and we are concerned that many states will be unable to complete reforms in a timely manner or will otherwise decline to act. Indeed, the Missouri Commission endorsed a section 251(b)(5) approach because "states should not be allowed to delay access reform."[1479] The lack of certainty and predictability for the industry without a uniform framework is a significant concern. Carriers and investors need predictability to make investment and deployment decisions and lack of certainty regarding intrastate access rates or recovery hampers these efforts. In addition some parties warned that it would be "extremely costly" to participate in "the multitude" of state commission proceedings that would follow from an approach relying on dozens of different state transitions and recovery frameworks.[1480]

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Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Attach. A (filed Sept. 21, 2011); Letter from Brian J. Benison, Director – Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 05-337, GN Docket No. 09-51, Attach. 1, 2 (filed Oct. 25, 2010) (AT&T Oct. 25, 2010 *Ex Parte* Letter); Petition of Sprint to Reduce Intrastate Access Rates of Incumbent Local Exchange Carriers in North Carolina, Interim Report of the Access Charges Working Group, Docket P-100, Sub 167 (filed Oct. 14, 2010), *cited in* NASUCA *USF/ICC Transformation NPRM* Comments at 73 n.214. Since the release of the *USF/ICC Transformation NPRM*, we note that there have been additional intrastate access reform efforts. *See, e.g.*, 2011 Tenn. Pub. Acts 068 (codified at TENN. CODE. ANN. § 65-5-301 et seq.); *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers and the Pennsylvania Universal Service Fund*, Docket No. I-00040105, Opinion and Order, (Pa. PUC rel. July 18, 2011).

1474 *See, e.g.*, Michigan Commission *USF/ICC Transformation NPRM* Comments at 10; New Jersey Board *USF/ICC Transformation NPRM* Comments at 5; *Board's Investigation and Review of Local Exchange Carrier Intrastate Access Rates*, Docket No. TX08090830, Telecommunications Order, 27 (NJ Bd. of Pub. Utils. Feb. 1, 2010); 2011 Tenn. Pub. Acts 068 (codified at TENN. CODE. ANN. § 65-5-301 et seq.).

1475 *See, e.g.*, Kansas Commission *USF/ICC Transformation NPRM* Comments at 15; Massachusetts DTC *USF/ICC Transformation NPRM* Comments at 19.

1476 *See, e.g.*, Missouri Commission *USF/ICC Transformation NPRM* Comments at 17.

1477 The record indicates that, in some cases, state reform efforts have taken well over a decade, sometimes with little result. *See* Verizon *USF/ICC Transformation NPRM* Reply at 57-66 (describing the length of reform efforts in states including Minnesota and Arizona and noting that South Dakota recently completed a six year proceeding that resulted in a rule capping CLEC rates "at a remarkably high six cents per minute").

1478 *See* Florida Commission *USF/ICC Transformation NPRM* Comments at 5; Montana Commission *USF/ICC Transformation NPRM* Reply at 5.

1479 Missouri Commission *USF/ICC Transformation NPRM* Comments at 19 ("One option is for states to remain responsible for reforming intrastate access charges while the second option relies on the FCC to establish a methodology which states would then work with the FCC to implement. The MoPSC prefers the second option. Assuming the FCC's initial goal of intercarrier compensation reform is for parity between intrastate and interstate rates then the FCC should set a schedule for achieving that objective. States should be allowed to accelerate intrastate reform; however, a state should not be allowed to delay access reform."); *see also* Wisconsin Commission *August 3 PN* Comments at 5.

1480 CBeyond et al. *USF/ICC Transformation NPRM* Comments at 8.

795. In addition, as noted above, adopting a uniform federal transition and recovery mechanism will free states from potentially significant financial burdens. Our recovery mechanism will provide carriers with recovery for reductions to eligible interstate *and* intrastate revenue. As a result, states will not be required to bear the burden of establishing and funding state recovery mechanisms for intrastate access reductions, while states will continue to play a role in implementation. Furthermore, the Residential Rate Ceiling adopted as part of our recovery mechanism will help ensure that consumer telephone rates remain affordable, and will also recognize so-called "early adopter" states that have already undertaken reform of intrastate access charges and rebalanced rates.[1481]

796. Some commenters argued that the uniform approach we take today is inappropriate because states should be allowed to pursue tailored intrastate access reforms.[1482] We appreciate and respect the expertise and on-the-ground knowledge of our state partners concerning intrastate telecommunications. Indeed, as we have said, states will have responsibility for implementing the bill-and-keep methodology adopted herein and will continue to oversee the tariffing of intrastate rates during the transition period and interconnection negotiations and arbitrations pursuant to section 252, as well as determine the network "edge" for purposes of bill-and-keep.[1483] With respect to the ultimate ICC framework and the intervening transition, however, we find that a uniform national approach will best create predictability for carriers and promote efficient pricing and new investment to the benefit of consumers.

797. We also conclude that a uniform transition to bill-and-keep is preferable to the plan of State Members of the Universal Service Joint Board that would set a positive per-minute ICC rate per carrier that could be higher than existing reciprocal compensation rates.[1484] In particular, the State Members suggest that the Commission set a single rate per provider for all purchasers in a single location, and then provide states the option of adopting this proposal or not.[1485] If a state adopts the single rate per provider option it would require "that each telecommunications carrier in the State would establish a maximum intercarrier per-minute termination rate that is no higher than the lower of its own current per-minute interstate termination rate and its average intercarrier compensation terminating rate."[1486] Under this plan, however, states could choose not to adopt the single rate per provider option and therefore could maintain existing intrastate rates in perpetuity, preserving all the associated problems with the current system.

C. Transition

798. In light of our decision to adopt a uniform federal transition to bill-and-keep, in this section we set out a default transition path for terminating end office switching and certain transport rate elements to begin that process. We also begin the process of reforming other rate elements by capping all interstate rate elements as of the effective date of the rules adopted pursuant to this Order,[1487] and capping terminating intrastate rates for all carriers. Doing so ensures that no rates increase during reform, and that

[1481] *See infra* paras. 913 - 916.

[1482] *See, e.g.,* Kansas Commission *USF/ICC Transformation NPRM* Comments at 36-39; Michigan Commission *USF/ICC Transformation NPRM* Comments at 9.

[1483] *See supra* para. 776; *infra* paras. 1321, 1370.

[1484] *See* State Members *USF/ICC Transformation NPRM* Comments at 153-55.

[1485] *See id. See also* Cincinnati Bell *USF/ICC Transformation NPRM* Comments at 15-16 (supporting the State Members' Plan as a possible alternative).

[1486] State Members *USF/ICC Transformation NPRM* Comments at 154.

[1487] The effective date of the rules will be 30 days after the rules are published in the Federal Register.

carriers do not shift costs between or among other rate elements, which would be counter to the principles we adopt today. And, this transition will help minimize disruption to consumers and service providers by giving parties time, certainty, and stability as they adjust to an IP world and a new compensation regime.

799. In the *USF/ICC Transformation NPRM*, we sought comment on the transition away from existing intercarrier compensation rates to facilitate carriers' movement to IP networks, including the sequencing and timing of rate reductions that would allow carriers to plan appropriately.[1488] The record contains a variety of recommendations for the length of the transition period and the rates that would be affected during different phases of the transition.[1489] Some of these proposals would begin the reform process by reducing intrastate switched access rates, and in some cases, reciprocal compensation rates, down to interstate rate levels over three to five years.[1490] Other proposals would reduce both interstate and intrastate rates to bill-and-keep or another end-point in the same amount of time.[1491] Parties also supported different transition periods by carrier type. For example, some parties submit that rate-of-return carriers should be given longer to reduce their rates than price cap carriers because the costs and rates of rate-of-return carriers generally are significantly higher than those of price cap carriers.[1492] Some parties suggest that competitive LECs should be given more time than other carriers to transition their rates.[1493]

800. Balancing these considerations, we set forth our transition path for terminating end office switching and certain transport rate elements and reciprocal compensation charges in Figure 9. In brief, our transition plan first focuses on the transition for terminating traffic, which is where the most acute intercarrier compensation problems, such as arbitrage, currently arise. We believe that limiting reductions at this time to terminating access rates will help address the majority of arbitrage and manage the size of the access replacement mechanism. We also take measures today to start reforming other elements as well by capping all interstate switched access rates in effect as of the effective date of the rules, including originating access and all transport rates. Absent such action, rate-of-return carriers could shift costs between or among other rate elements and rates to interconnecting carriers could continue to increase as they have been in the past years, which is counter to the reform we adopt today. Even so, we do not

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1488 *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4720-28, paras. 533-55. This is consistent with the National Broadband Plan, which observed that "[s]udden changes in USF and ICC could have unintended consequences that slow progress" and that "[s]uccess will come from a clear road map for reform, including guidance about the timing and pace of changes to existing regulations, so that the private sector can react and plan appropriately." National Broadband Plan at 141.

1489 *See, e.g.*, AT&T *USF/ICC Transformation NPRM* Comments at 30-32; California Commission *USF/ICC Transformation NPRM* Comments at 18-20; CBeyond et al. *USF/ICC Transformation NPRM* Comments at 4-7; Comcast *USF/ICC Transformation NPRM* Comments at 3-6; CTIA *USF/ICC Transformation NPRM* Comments at 37-39; Earthlink *USF/ICC Transformation NPRM* Comments at 11; Frontier *USF/ICC Transformation NPRM* Comments at 5, 7-8; Global Crossing *USF/ICC Transformation NPRM* Comments at 14; Kansas Commission *USF/ICC Transformation NPRM* Comments at 39-41; Level 3 *USF/ICC Transformation NPRM* Comments at 6-8; MetroPCS *USF/ICC Transformation NPRM* Comments at 6-7; MoSTCG *USF/ICC Transformation NPRM* Comments at 10; T-Mobile *USF/ICC Transformation NPRM* Comments at 27-28.

1490 *See, e.g.*, CBeyond et al. *USF/ICC Transformation NPRM* Comments at 4, Earthlink *USF/ICC Transformation NPRM* Comments at 11, Frontier *USF/ICC Transformation NPRM* Comments at 5, 7-8, Global Crossing *USF/ICC Transformation NPRM* Comments at 14, and Level 3 *USF/ICC Transformation NPRM* Comments at 6-8.

1491 AT&T *USF/ICC Transformation NPRM* Comments at 30.

1492 Rural Associations *August 3 PN* Comments at 35-39.

1493 *See, e.g.*, COMPTEL *August 3 PN* Comments at 20-22.

specify the transition to reduce these rates further at this time. Instead, we seek comment regarding the transition and recovery for such other rate elements in the FNPRM.[1494]

801. Thus, at the outset of the transition, all interstate switched access and reciprocal compensation rates will be capped at rates in effect as of the effective date of the rules.[1495] We cap these rates as of the effective date of the Order, as opposed to a future date such as January 1, 2012,[1496] to ensure that carriers cannot make changes to rates or rate structures to their benefit in light of the reforms adopted in this Order. For price cap carriers, all intrastate rates will also be capped, and, for rate-of-return carriers, all terminating intrastate access rates will also be capped. Consistent with many proposals in the record, our transition plan provides rate-of-return carriers, whose rates typically are higher, additional time to transition as appropriate. Specifically, we conclude that a six-year transition for price cap carriers and competitive LECs that benchmark to price cap carrier rates and a nine-year transition for rate-of-return carriers and competitive LECs that benchmark to rate-of-return carrier rates to transition rates to bill-and-keep strikes an appropriate balance that will moderate potential adverse effects on consumers and carriers of moving too quickly from the existing intercarrier compensation regimes.[1497]

Intercarrier Compensation Reform Timeline		
Effective Date	**For Price Cap Carriers and CLECs that benchmark access rates to price cap carriers**[1498]	**For Rate-of-Return Carriers and CLECs that benchmark access rates to rate-of-return carriers**[1499]
Effective Date of the rules	All intercarrier switched access rate elements, including interstate and intrastate originating and terminating rates and reciprocal compensation rates are capped.	All interstate switched access rate elements, including all originating and terminating rates and reciprocal compensation rates are capped. Intrastate terminating rates are also capped.

[1494] We do, however, cap price cap interstate and intrastate originating access rates to combat potential arbitrage and other efforts designed to increase or otherwise maximize sources of intercarrier revenues during the transition.

[1495] Although the ABC Plan and Joint Letter proposed that rates should be capped on January 1, 2012, ABC Plan at 11, Joint Letter at 3, we cap such rates as of the effective date of the rules. This will ensure that carriers do not seek to inflate their access charges in advance of our reforms. Specifically, we cap all rate elements in the "traffic sensitive basket" and the "trunking basket" as described in 47 C.F.R. §§ 61.42(d)(2)-(3) unless a price cap carrier made a tariff filing increasing any such rate element prior to the effective date of the rules and such change was not yet in effect.

[1496] *See* ABC Plan, Attach. 1 at 11; Joint Letter at 3 & n.1.

[1497] As a baseline, we adopt the transition proposed in the ABC Plan and Joint Letter with the addition of an extra year to allow each set of carriers to complete a transition to bill-and-keep. *See id.*

[1498] ABC Plan, Attach. 1 at 11. We note that CMRS providers are subject to mandatory detariffing. Nonetheless, CMRS providers are included in the transition to the extent their reciprocal compensation rates are inconsistent with the reforms we adopt here.

[1499] Joint Letter at 3 & n.1. We note that carriers remain free to make elections regarding participation in the NECA pool and tariffing processes during the transition. *See* 47 C.F.R. § 69.601 et seq. At the same time, we decline to adopt the Rural Associations' proposal to require carriers that withdraw from NECA association tariffs for switched access elements to continue to contribute to the pool as if they had remained part of the NECA pool. *See* Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos.10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Attach. at 25 (filed Oct. 17, 2011). Such a requirement would frustrate efficiencies generated by our reforms and could unnecessarily burden carriers with costs that are no longer necessary.

July 1, 2012	Intrastate terminating switched end office[1500] and transport rates,[1501] originating and terminating dedicated transport,[1502] and reciprocal compensation rates, if above the carrier's interstate access rate, are reduced by 50 percent of the differential between the rate and the carrier's interstate access rate.	Intrastate terminating switched end office[1503] and transport rates,[1504] originating and terminating dedicated transport,[1505] and reciprocal compensation rates, if above the carrier's interstate access rate, are reduced by 50 percent of the differential between the rate and the carrier's interstate access rate.
July 1, 2013	Intrastate terminating switched end office and transport rates and reciprocal compensation, if above the carrier's interstate access rate, are reduced to parity with interstate access rate.	Intrastate terminating switched end office and transport rates and reciprocal compensation, if above the carrier's interstate access rate, are reduced to parity with interstate access rate.
July 1, 2014	Terminating switched end office and reciprocal compensation rates are reduced by one-third of the differential between end office rates and $0.0007.*	Terminating switched end office and reciprocal compensation rates are reduced by one-third of the differential between end office rates and $0.005.*
July 1, 2015	Terminating switched end office and reciprocal compensation rates are reduced by an additional one-third of the original differential to $0.0007.*	Terminating switched end office and reciprocal compensation rates are reduced by an additional one-third of the original differential to $0.005.*
July 1, 2016	Terminating switched end office and reciprocal compensation rates are reduced to $0.0007.*	Terminating switched end office and reciprocal compensation rates are reduced to $0.005.*
July 1, 2017	Terminating switched end office and reciprocal compensation rates are reduced to bill-and-keep. Terminating switched end office and transport are reduced to $0.0007 for all terminating traffic within the tandem serving area when the terminating carrier owns the serving tandem switch.	Terminating end office and reciprocal compensation rates are reduced by one-third of the differential between its end office rates ($0.005) and $0.0007.*
July 1, 2018	Terminating switched end office and transport are reduced to bill-and-keep for all terminating traffic within the tandem serving area when the terminating carrier owns the serving tandem switch.	Terminating switched end office and reciprocal compensation rates are reduced by an additional one-third of the differential between its end office rates as of July 1, 2016 and $0.0007.*
July 1, 2019		Terminating switched end office and reciprocal compensation rates are reduced to $0.0007.*
July 1, 2020		Terminating switched end office and reciprocal compensation rates are reduced to bill-and-keep.*

[1500] *See* App. A, 47 C.F.R. § 51.903(d).

[1501] *See* App. A, 47 C.F.R. § 51.903(i).

[1502] *See* App. A, 47 C.F.R. § 51.903(c).

[1503] *See* App. A, 47 C.F.R. § 51.903(d).

[1504] *See* App. A, 47 C.F.R. § 51.903(i).

[1505] *See* App. A, 47 C.F.R. § 51.903(c).

* Transport rates remain unchanged from the previous step.

Figure 9

802. We believe that these transition periods strike the right balance between our commitment to avoid flash cuts and enabling carriers sufficient time to adjust to marketplace changes and technological advancements, while furthering our overall goal of promoting a migration to modern IP networks.[1506] We find that consumers will benefit from this regulatory transition, which enables their providers to adapt to the changing regulatory and technical landscape and will enable a faster and more efficient introduction of next-generation services.

803. The transition we adopt is partially based on a stakeholder proposal,[1507] with certain modifications, including the adoption of a bill-and-keep methodology as the end state for all traffic. As explained further below, states will play a key role in implementing the framework we adopt today. In particular, states will oversee changes to intrastate access tariffs to ensure that modifications to intrastate tariffs are consistent with the framework and rules we adopt today. For example, states will help guard against carriers improperly moving costs between or among different rate elements to reap a windfall from reform.

804. Since intercarrier compensation charges are constrained by the transition glide path that we adopt, we will be monitoring to ensure that carriers do not shift costs to other rate elements that are not specifically covered, such as special access or common line. We also clarify that, in cases where a provider's interstate terminating access rates are higher than its intrastate terminating access rates, intrastate rate reductions shall begin to occur at the stage of the transition in which interstate rates come to parity with intrastate rate levels.[1508]

805. The transition imposes a cap on originating intrastate access charges for price cap carriers at current rates as of the effective date of the rules. The transition does not cap originating intrastate access charges for rate-of-return carriers. Rate-of-return carriers suggested that it would not be viable for them to reduce terminating switched rates, while at the same time reducing originating rates without overburdening the Universal Service Fund.[1509] In the meantime, rate-of-return carriers indicate that the wholesale long distance market will constrain originating rates.[1510] Given our commitment to control the

[1506] We decline to adopt a "tribal carve-out" for ICC reform as proposed by Gila River. *See* Letter from Tom W. Davidson, Counsel to Gila River Telecommunications, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket Nos. 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45 at 2 n.2 (filed Oct. 21, 2011). There is insufficient evidence in the record demonstrating that any such carve-out is necessary; nor is there any evidence that the recovery mechanism we adopt below, coupled with the Total Earnings Review process for additional recovery described below, is somehow insufficient for Tribal carriers. Moreover, we are concerned that such a carve-out could invite arbitrage opportunities that we are seeking to curtail in this Order.

[1507] *See* ABC Plan, Attach. 1 at 11; Joint Letter at 3 & n.1.

[1508] *See* App. A, 47 C.F.R. §§ 51.907, 909. As we describe above, in most cases intrastate terminating access rates are higher than intrastate rates (*see supra* para. 791), and we believe that initially focusing our reforms to address this disparity is appropriate. *But see* Letter from Tina Pidgeon et al., General Communication, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 2 (filed Oct. 6, 2011) (proposing that the higher of interstate or intrastate access rates be reduced during the first two years).

[1509] Rural Associations *August 3 PN* Comments at 40.

[1510] *Id.* at 41 ("[I]f originating access rates are not reduced . . . then the interexchange carriers upon which RLECs rely to provide retail toll service will likely increase their wholesale rates . . . . Another likely outcome is that some IXCs may simply exit rural markets and no longer provide wholesale services to RLECs.").

size of the CAF and minimize burdens on consumers, we do not cap intrastate originating access charges for rate-of-return carriers at this time. As noted above, we have placed priority on reform of terminating access charges and we are mindful of the compromises that must be made to accomplish meaningful reform in a measured and timely manner. In the FNPRM, we seek comment on the transition of *all* originating access charges to bill-and-keep, including originating intrastate access charges for rate-of-return carriers.

806. *CMRS Providers*. As noted above, CMRS providers will be subject to the transition applicable to price cap carriers. Although CMRS providers are subject to mandatory detariffing, these providers are included to the extent their reciprocal compensation rates are inconsistent with the reforms we adopt here.[1511] In section XV, we also address compensation for non-access traffic exchanged between LECs and CMRS providers. As we detail in that section, we immediately adopt bill-and-keep as the default compensation methodology for non-access traffic exchanged between LECs and CMRS providers under section 20.11 of our rules and Part 51.

807. *Competitive LECs*. To ensure smooth operation of our transition, we provide competitive LECs that benchmark their rates a limited allowance of additional time to make tariff filings during the transition period. Application of our access reforms will generally apply to competitive LECs via the CLEC benchmarking rule.[1512] For interstate switched access rates,[1513] competitive LECs are permitted to tariff interstate access charges at a level no higher than the tariffed rate for such services offered by the incumbent LEC serving the same geographic area (the benchmarking rule).[1514] There are two exceptions to the general benchmarking rule. First, rural competitive LECs offering service in the same areas as non-rural incumbent LECs are permitted to "benchmark" to the access rates prescribed in the NECA access tariff, assuming the highest rate band for local switching (the rural exemption). Second, as explained in Section XI.A above, competitive LECs meeting the access revenue sharing definition are required to benchmark to the lowest interstate switched access rate of a price cap LEC in the state.[1515] Because we retain the CLEC benchmark rule during the transition, we allow competitive LECs an extra 15 days from the effective date of the tariff to which a competitive LEC is benchmarking to make its filing(s). We emphasize that the rates that are filed by the competitive LEC must comply with the applicable benchmarking rate. As is the case now, we decline to adopt rules governing the rates that competitive LECs may assess on their end users.

[1511] *See supra* note 1498.

[1512] In cases where more than one incumbent LEC operates within a competitive LEC's service area and those incumbent LECs are both price cap and rate-of-return regulated, a question may arise as to the appropriate transition track for the competitive LEC. *See Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9131-32, paras 46-48 (2004). If the competitive LEC tariffs a benchmarked or average rate in such circumstances, that competitive LEC shall adopt the transition path applicable to the majority of lines capable of being served in its territory. For example, if price cap carriers serve 70 percent of a competitive LEC's service territory and rate-of-return carriers serve 30 percent of the service territory, then the competitive LEC using a blended rate should follow the price cap transition.

[1513] References to access services and access rate elements in our rules or otherwise does not presuppose the application of access charge regulation.

[1514] *See* 47 C.F.R. § 61.26; *see also CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

[1515] *See infra* para. 679.

808. We decline to adopt a separate and longer transition period for competitive LECs, as suggested by some commenters.[1516] For one, competitive LEC rates are already at or near parity for many if not all access rates. Due to the operation of the Commission's CLEC benchmark rules, competitive LEC tariffed access rates are largely already at parity with incumbent LEC rates. And, in a large number of states, competitive LEC intrastate access rates are at or near parity to those of the incumbent LEC, as well.[1517] Thus, we do not find a sufficient basis for creating a separate transition for competitive LECs. Moreover, the transition periods of six and nine years are sufficiently long to permit advance planning and represent a careful balance of the interests of all stakeholders. As a result, we conclude that a uniform approach for all LECs is preferable and do not find compelling evidence to depart from the important policy objectives underlying the CLEC benchmarking rule. Further, new arbitrage opportunities could arise and increased regulatory oversight would be necessary were we to abandon the CLEC benchmarking rule.

1. Authority To Specify the Transition

809. Specifying the timing and steps for the transition to bill-and-keep requires us to make a number of line-drawing decisions. Although we could avoid those decisions by moving to bill-and-keep immediately, such a flash cut would entail significant market disruption to the detriment of consumers and carriers alike. As the D.C. Circuit has recognized, "[w]hen necessary to avoid excessively burdening carriers, the gradual implementation of new rates and policies is a standard tool of the Commission," and the transition "may certainly be accomplished gradually to permit the affected carriers, subscribers and state regulators to adjust to the new pricing system, thus preserving the efficient operation of the interstate telephone network during the interim."[1518] Thus, "[i]t is reasonable for the FCC to take into account the ability of the industry to adjust financially to changing policies," and "[i]nterim solutions may need to consider the past expectations of parties and the unfairness of abruptly shifting policies."[1519] In such circumstances, "the FCC should be given 'substantial deference' when acting to impose interim regulations."[1520]

810. In our judgment, the framework we adopt carefully balances the potential industry disruption for both payers and recipients of intercarrier compensation as we transition to a new intercarrier compensation regime more broadly. It is particularly appropriate for the Commission to exercise its authority to craft a transition plan in this context, where the Commission is acting, as it has in prior orders, to reconcile the "implicit tension between" the Act's goals of "moving toward cost-based

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[1516] *See, e.g.*, COMPTEL *August 3 PN* Comments at 20-22; TDS Metrocom *August 3 PN* Reply at 4-5. *But see* Northern Telephone & Data Corp. Ex Parte Comments at 2-3 (filed Oct. 20, 2011) ("Any plan adopted by the Commission cannot treat ILECs and CLECs differently; and similarly, must recognize than [sic] many rural CLECs, such as NTD, should receive the same treatment as rural ILECs under the transition.").

[1517] *See, e.g.*, Verizon New England, Inc., et al., for Investigation under Chapter 159, Section 14, of the Intrastate Access Rates of Competitive Local Exchange Carriers, D.T.C. 07-9, Order, (Mass. D.T.C. June 22, 2009), *aff'd*, Order on Motion for Reconsideration and Clarification (Dec. 7, 2009); DEL. CODE ANN. tit. 26 § 707(e) (2008); MO. ANN. STAT. § 392.370 (2008); 66 PA. CONS. STAT. ANN. § 3017(c) (2004); 20 VA. ADMIN. CODE § 5-417-50(E) (2007); WASH. ADMIN. CODE § 480-120-540(2) (2007).

[1518] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1135-36 (D.C. Cir. 1984).

[1519] *MCI Telecommc'ns Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984).

[1520] *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1106 (D.C. Cir. 2009); *see also ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002); *Competitive Telecommc'ns Ass'n v. FCC*, 117 F.3d 1068, 1073-75 (8th Cir. 1997); *MCI*, 750 F.2d at 141.

rates and protecting universal service."[1521]

2. Implementation Issues

811. We now address a number of ancillary issues surrounding implementation of the transition. First, we describe the continuing role of tariffs during the transition. Next, we discuss price cap conversions and the impact of our reforms on existing agreements. Finally, we address pending petitions that are mooted by the changes adopted as part of the transition.

812. *Role of Tariffs*. Under today's intercarrier compensation system, carriers typically tariff their access charges. To avoid disruption of these well-established relationships,[1522] we preserve a role for tariffing charges for toll traffic during the transition.[1523] Pursuant to the transition set forth above, we permit LECs to tariff the default charges for intrastate toll traffic at the state level, and for interstate toll traffic with the Commission, in accordance with the timetable and rate reductions set forth above.[1524] At the same time, carriers remain free to enter into negotiated agreements that differ from the default rates established above, consistent with the negotiated agreement framework that Congress envisioned for the 251(b)(5) regime to which access traffic is transitioned. As an interim matter, this new regime will facilitate the benefits that can arise from negotiated arrangements, while also allowing for revenue predictability that has been associated with tariffing.[1525] In some respects our allowance of some tariffing may be similar to the wireless termination tariffs for non-access traffic addressed in the Commission's 2005 *T-Mobile Order*.[1526] In that decision, the Commission prohibited the filing of state tariffs governing the compensation for terminating non-access CMRS traffic because they were inconsistent with the negotiated agreement framework contemplated by Commission precedent and by Congress when it enacted section 251.[1527] We do not, however, believe that the policies underlying the prohibition of wireless termination tariffs for non-access traffic in the *T-Mobile Order* precludes our allowance of certain tariffing of intercarrier compensation for toll traffic.[1528] Finally, during the transition, traffic that historically has been addressed through interconnection agreements will continue to be so addressed.

1521 *Southwestern Bell Tel. Co. v. FCC,* 153 F.3d 523, 538 (8th Cir. 1998).

1522 *See* Letter from Mary McManus, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, at 2 (filed Oct. 5, 2011) (Comcast Oct. 5, 2011 *Ex Parte* Letter).

1523 In the FNPRM, we seek comment on whether the Commission needs to forbear from tariffing requirements in section 203 of the Act and part 61 of our rules to enable carriers to negotiate alternative arrangements pursuant to this Order. *See infra* para. 1322.

1524 Although we do not require a "fresh look" to open existing contracts, we recognize that the framework we adopt today encourages carriers to enter into contracts in lieu of the tariffing framework. If two carriers do not have a reciprocal compensation rate today or are otherwise unable to agree to a rate through negotiations, we make clear that state commissions will continue to have a role in establishing rates for non-access traffic where those rates had not been previously established. States may initially establish such rates on the basis of the Commission's existing cost methodology (TELRIC) consistent with section 51.715 or on the basis of the Commission's new cost methodology, i.e., bill-and-keep. After such rates are initially established, they shall be subject to the transition set forth above.

1525 *See infra* para. 961.

1526 *T-Mobile Order*, 20 FCC Rcd at 4860, para. 9.

1527 *See id.* As provided in Section XIV, we do not disrupt the regulatory approach applicable to CMRS providers, which are subject to detariffing.

1528 *See infra* paras. 964-965.

813. Because carriers will be revising intrastate access tariffs to reduce rates for certain terminating switched access rate elements, and capping other intrastate rates,[1529] states will play a critical role implementing and enforcing intercarrier compensation reforms. In particular, state oversight of the transition process is necessary to ensure that carriers comply with the transition timing and intrastate access charge reductions outlined above. Under our framework, rates for intrastate access traffic will remain in intrastate tariffs.[1530] As a result, to ensure compliance with the framework and to ensure carriers are not taking actions that could enable a windfall and/or double recovery, state commissions should monitor compliance with our rate transition; review how carriers reduce rates to ensure consistency with the uniform framework; and guard against attempts to raise capped intercarrier compensation rates, as well as unanticipated types of gamesmanship. Consistent with states' existing authority, therefore, states could require carriers to provide additional information and/or refile intrastate access tariffs that do not follow the framework or rules adopted in this Order. Moreover, state commissions will continue to review and approve interconnection agreements and associated reciprocal compensation rates to ensure that they are consistent with the new federal framework and transition. Thus, we will be working in partnership with states to monitor carriers' compliance with our rules, thereby ensuring that consumers throughout the country will realize the tremendous benefits of ICC reform.

814. *Price Cap Conversions.* The Commission has regulated the provision of interstate access services by incumbent LECs, pursuant to either rate-of-return regulation or price cap regulation. The Commission has previously described the benefits that flow from the adoption of price cap regulation,[1531] and has allowed carriers to convert from rate-of-return to price cap regulation.[1532] The Commission continues to encourage carriers to undergo such conversions. The application of our reforms to proposed conversions will be addressed in the context of those proceedings based on the individualized situation of the carrier seeking to convert to price cap regulation.[1533]

815. *Existing Agreements.* With respect to the impact of our reforms on existing agreements, we emphasize that our reforms do not abrogate existing commercial contracts or interconnection agreements or otherwise require an automatic "fresh look" at these agreements.[1534] As the Commission

[1529] We do not cap intrastate originating access for rate-of-return carriers in this Order. We note that states remain free to do so, provided states support any recovery that may be necessary, and such a result would promote the goals of comprehensive reform adopted today.

[1530] As we describe in Section XIII, we require carriers to file with their interstate tariffs all data, including as relevant intrastate rates and MOU, necessary to verify eligibility for ARC replacement funding.

[1531] *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6790-91 para. 33 (1990).

[1532] *See, e.g., CenturyTel, Inc. Petition for Conversion to Price Cap Regulation and Limited Waiver Relief*, WC Docket No. 08-191, Order, 24 FCC Rcd 4677 (WCB 2009); *Windstream Petition for Conversion to Price cap Regulation and for Limited Waiver Relief*, WC Docket No. 07-171, Order, 23 FCC Rcd 5294 (2008).

[1533] Similarly, transition issues related to rate-of-return affiliates of price cap holding companies, *see supra* para. 271, will be addressed in the context of such proceedings as well.

[1534] In the past, several commenters have requested that the Commission give them a fresh look at existing contracts in the context of comprehensive reform. *See, e.g.*, Letter from Richard R. Cameron and Teresa D. Baer, Counsel for Global Crossing, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-152, 99-68; CC Docket Nos. 01-92, 96-45 at 2 (filed Sept. 18, 2008) (asking that the Commission "provide an 18-month window within which carriers can reconfigure their interconnection facilities without incurring reconfiguration charges or early termination liabilities under existing transport contracts"); Sage Telecom *2008 ICC/USF FNPRM* Comments at 13 ("The Commission should be aware that wholesale agreements for local service (unbundled network element platform replacement agreements) often contain rates for transport and termination of traffic . . . . While these agreements (continued...)

has recognized, both telecommunications carriers and their customers often benefit from long-term contracts—providers gain assurance of cost recovery, and customers (whether wholesale or end-users) may receive discounted and stable prices—and we try to avoid disrupting such contracts.[1535] Indeed, giving carriers or customers an automatic fresh look at existing commercial contracts or interconnection agreements could result in a windfall for entities that entered long-term arrangements in exchange for lower prices, as compared to other entities that avoided the risk of early termination fees by electing shorter contract periods at higher prices.[1536] Accordingly, we decline to require that these existing arrangements be reopened in connection with the reforms in this Order, and leave such issues to any change-of-law provisions in these arrangements and commercial negotiations among the parties.[1537] We do, however, make clear that our actions today constitute a change in law, and we recognize that existing agreements may contain change-of-law provisions that allow for renegotiation and/or may contain some mechanism to resolve disputes about new agreement language implementing new rules.

816. *Dismissal as Moot of Pending Petitions.* The reforms adopted today render moot a petition filed by Embarq in 2008 and a petition filed by Michigan CLECs in 2010.[1538] The Embarq petition sought waivers that would allow it to unify its switched access rates by making reductions to its intrastate rates and offsetting increases to its interstate rates.[1539] The actions taken in this Order, which set forth a comprehensive intercarrier compensation plan, render the Embarq petition moot and, we further note that CenturyLink has subsequently filed a letter seeking to withdraw the petition.[1540] The Michigan CLECs filed a petition asking the Commission to preempt Michigan's 2009 access restructuring law,

(Continued from previous page)

were of course 'negotiated,' they were negotiated under particular assumptions regarding the applicable regulatory defaults, and under circumstances of asymmetrical bargaining power. The Commission should consider whether such provisions will adversely affect competition and thus should be subject to a fresh look.").

[1535] *See, e.g., Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17400, 17402–03, paras. 692, 697–99 (2003) (*Triennial Review Order*); *see also, e.g.*, AT&T 2005 *ICC FNPRM* Reply at 17–20 (arguing against giving end users a fresh look at existing contracts). To the extent that there is evidence that particular termination penalties are inappropriate, the Commission can resolve such a matter through an enforcement proceeding. *See Triennial Review Order*, 18 FCC Rcd at 17403, para. 698.

[1536] *See Triennial Review Order*, 18 FCC Rcd at 17403, para. 699.

[1537] This situation is thus different from cases where the Commission found that certain contract provisions might adversely affect competition or where end-user customers would be denied the benefits of new Commission policy absent a fresh look opportunity. *See, e.g., Local Competition First Report and Order*, 11 FCC Rcd at 16044, para. 1094; *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Second Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 7341, 7350, para. 21 (1993) (allowing a fresh look at agreements in "situations where excessive termination liabilities would affect competition for a significant period of time"); *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5906, para. 151 (1991) (giving customers of AT&T 90 days to terminate their contracts without penalty to let them "tak[e] advantage of 800 number portability when it arrives").

[1538] *See* Petition for Waiver of Embarq Pleading Cycle Established, WC Docket No. 08-160, Public Notice, 23 FCC Rcd 11914 (2008); Pleading Cycle Established for Comments on Joint Michigan CLEC Petition for Declaratory Ruling and Motion for Temporary Relief, WC Docket No. 10-45, Public Notice, 25 FCC Rcd 1807 (2010).

[1539] *See* Petition for Waiver of Embarq Local Operating Companies of Sections 61.3 and 61.44-61.48 of the Commission's Rules, and any Associated Rules Necessary to Permit it to Unify Switched Access Charges Between Interstate and Intrastate Jurisdictions, WC Docket No. 08-160 (filed Aug. 1, 2008).

[1540] *See* Letter from Jeffrey Lanning, Assistant Vice President – Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-160 (filed June 23, 2011).

which mandated intrastate access rate reductions and created an access restructuring mechanism that was unavailable to CLECs.[1541] Here, again, the actions we take in this Order, which include bringing intrastate access traffic within section 251(b)(5) and subjecting that traffic to the above transition, address many of the access rates elements at issue in the Michigan CLECs' petition.[1542] We therefore dismiss the petition as the reforms in this Order and the accompanying FNPRM will render it moot.

3. Other Rate Elements

817. *Originating Access.* We find that originating charges also should ultimately be subject to the bill-and-keep framework. Some commenters urge that originating charges be retained, at least on an interim basis.[1543] Other parties express concerns with the retention of originating access charges.[1544] The legal framework underpinning our decision today is inconsistent with the permanent retention of originating access charges. In the *Local Competition First Report and Order*, the Commission observed that section 251(b)(5) does not address charges payable to a carrier that originates traffic and concluded, therefore, that such charges were prohibited under that provision of the Act.[1545] Accordingly, we find that originating charges for all telecommunications traffic subject to our comprehensive intercarrier compensation framework should ultimately move to bill-and-keep.

818. Notwithstanding this conclusion, we take immediate action to cap all interstate originating access charges and intrastate originating access charges for price cap carriers. Although we do not establish the transition for rate reductions to bill-and-keep in this Order, we seek comment in the FNPRM on the appropriate transition and recovery mechanism for ultimately phasing down originating access charges.[1546] Meanwhile, we prohibit carriers from increasing their originating interstate access rates above those in effect as the effective date of the rules.[1547] A cap on interstate originating access represents a first step as part of our measured transition toward comprehensive reform and helps to ensure that our initial reforms to terminating access are not undermined. Thus, interstate originating switched access rates will remain capped and may not exceed current levels until further action by the Commission addressing the appropriate transition path for this traffic.

[1541] *See* Joint Petition for Expedited Declaratory Ruling that the State of Michigan's Statute 2009 PA 182 is Preempted Under Sections 253 and 254 of the Communications Act, WC Docket No. 10-45 (filed Feb. 12, 2010).

[1542] To the extent that states have established rate reduction transitions for rate elements not reduced in this Order, nothing in this Order impacts such transitions. *See, e.g.*, Letter from John R. Liskey, Executive Director, MITA, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51 at 2 (filed Oct. 17, 2011). Nor does this Order prevent states from reducing rates on a faster transition provided that states provide any additional recovery support that may be needed as a result of a faster transition.

[1543] *See, e.g.,* ABC Plan, Attach. 1 at 11; Cincinnati Bell *August 3 PN* Comments at 3.

[1544] iBasis Retail, Inc. *August 3 PN* Comments at 2; CRUSIR *August 3 PN* Comments at 11-13; Texas Telephone *August 3 PN* Comments at 7-8.

[1545] *See Local Competition First Report and Order*, 11 FCC Rcd at 16016, para. 1042.

[1546] *See supra* Section XVII.M.

[1547] This prohibition on increasing access rates also applies to any remaining Primary Interexchange Carrier Charge in section 69.153 of the Commission's rules, the per-minute Carrier Common Line charge in section 69.154 of the Commission's rules, and the per-minute Residual Interconnection Charge in section 69.155 of the Commission's rules. 47 C.F.R. §§ 69.153, 69.154, 69.155. Price cap carriers and CLECs that benchmark to price cap rates are also prohibited from increasing their originating intrastate access rates.

819. *Transport.* Similarly, the transition path set forth above begins the transition for transport elements, including capping such rates, but does not provide the transition for all transport charges for price cap or rate-of-return carriers to bill-and-keep. For price cap carriers, in the final year of the transition, transport and terminating switched access shall go to bill-and-keep levels where the terminating carrier owns the tandem. However, transport charges in other instances, i.e., where the terminating carrier does not own the tandem, are not addressed at this time. Meanwhile, under the transition for rate-of-return carriers, which is consistent with the transition path put forward by the Joint Letter, interstate and intrastate transport charges will be capped at interstate levels in effect as of the effective date of the rules through the transition.[1548]

820. Ultimately, we agree with concerns raised by commenters that the continuation of transport charges in perpetuity would be problematic.[1549] For example, the record contains allegations of "mileage pumping," where service providers designate distant points of interconnection to inflate the mileage used to compute the transport charges.[1550] Further, Sprint alleges that current incumbent LEC tariffed charges for transport are "very high and constitute a sizeable proportion of the total terminating access charges ILECs impose on carriers today."[1551] More fundamentally, if transport rates are allowed to persist, it gives incumbent LECs incentives to retain a TDM network architecture and therefore likely serves as a disincentive for incumbent LECs to establish more efficient interconnection arrangements such as IP.[1552] As a result, commenters suggest that perpetuating high transport rates could undermine the Commission's reform effort and lead to anticompetitive behavior or regulatory arbitrage such as access stimulation.[1553] We therefore seek comment on the appropriate treatment of, and transition for, all tandem switching and transport rates in the FNPRM.[1554]

821. *Other Rate Elements.* Finally, we note that the transition set forth above caps rates but does not provide the transition path for all rate elements or other charges, such as dedicated transport charges.[1555] In our FNPRM, we seek comment on what transition should be set for these other rate elements and charges as part of comprehensive reform, and how we should address those elements.

4. Suspension or Modification Under Section 251(f)(2)

822. Section 251(f)(2) provides that a LEC with fewer than two percent of the country's subscriber lines may petition its state commission for a suspension or modification of the application to it of a requirement or requirements of section 251(b) or (c), and that the state commission shall grant such

[1548] *See* ABC Plan, Attach. 1 at 11; Joint Letter at 3.

[1549] *See, e.g.*, COMPTEL *August 3 PN* Comments at 14-20; NCTA *August 3 PN* Comments at 19-20; Sprint *August 3 PN* Comments at 11-16; T-Mobile *August 3 PN* Comments at 8.

[1550] *See* AT&T Section XV Comments at 5, 30-37; Letter from John T. Nakahata, Counsel to Level 3, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45, WC Docket Nos. 10-90, 07-135, 03-109, GN Docket No. 09-51, Attach at 2 (filed Sept. 16, 2011).

[1551] Sprint *August 3 PN* Comments at 13.

[1552] Sprint *August 3 PN* Comments at 15; NCTA *August 3 PN* Comments at 20.

[1553] *See* CBeyond et al. *August 3 PN* Comments at 15-18; NCTA *August 3 PN* Comments at 20; T-Mobile Aug*ust 3 PN* Comments at 7; Time Warner Cable *August 3 PN* Comments at 7; *see also* Section XVII.M.

[1554] *See supra* Section XVII.M.

[1555] *See* Level 3 *August 3 PN* Comments at 11-12; COMPTEL *August 3 PN* Comments at 18-20; Letter from Charles W. McKee, VP, Federal and State Regulatory, Sprint, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, at 2 (filed Oct. 3, 2011).

petition where it makes certain determinations.[1556] That provision further states that the state commission must act on the petition within 180 days and "may suspend enforcement of the requirement or requirements to which the petition applies" pending action on the petition.[1557] Parties aggrieved by a state commission decision under section 251(f) may seek review of that decision in federal district court – under section 252(e)(6) of the Act, if the decision is rendered in the course of arbitrating an interconnection agreement,[1558] or under general "federal question" jurisdiction if the decision arises outside of the arbitration context.[1559]

823. In *Iowa Utilities Board v. FCC*, the Eighth Circuit held that state commissions had "exclusive authority" to make decisions under section 251(f) and that the FCC lacked authority to prescribe "governing standards for such determinations."[1560] On review, however, the Supreme Court reversed the Eighth Circuit's decision with regard to the Commission's general authority to implement Title II of the Act. The Court stated that "the grant in § 201(b) [of the Act] means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252."[1561] Accordingly, we find that this general grant of rulemaking authority recognized by the Court includes the authority to adopt reasonable rules construing and implementing section 251(f).[1562]

824. In light of the Supreme Court's holding, we may adopt specific, binding prophylactic rules that give content to, among other things, the "public interest, convenience, and necessity" standard that governs states' exercise of section 251(f)(2) authority to act on suspension/modification petitions. We sought comment on specific rules in the *ICC/USF Transformation NPRM* and in the *2008 ICC NPRM*.[1563] However, given the limited record we received in response, we decline to adopt specific rules regarding section 251(f)(2) at this time. Nevertheless, we caution states that suspensions or modifications of the bill-and-keep methodology we adopt today would, among other things, re-introduce regulatory uncertainty, shift the costs of providing service to a LEC's competitors and the competitor's customers, increase transaction costs for terminating calls, and undermine the efficiencies gained from adopting a uniform national framework.[1564] Accordingly, we believe it highly unlikely that any attempt by a state to modify or suspend the federal bill-and-keep regime would be "consistent with the public interest, convenience and necessity" as required under section 251(f)(2)(B), and we urge states not to grant any

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[1556] 47 U.S.C. § 251(f)(2)("The State commission shall grant such petition to the extent that, and for such duration as, [it] determines that such suspension or modification -- (A) is necessary – (i) to avoid a significant adverse economic impact on users of telecommunications services generally; (ii) to avoid imposing a requirement that is unduly economically burdensome; or (iii) to avoid imposing a requirement that is technically infeasible; and "(B) is consistent with the public interest, convenience, and necessity.").

[1557] *Id.*

[1558] *See, e.g.*, *New Cingular Wireless PCS, LLC v. Finley*, 2010 WL 3860384 at *1, *11-*14 (E.D. N.C. 2010); *Wireless World, L.L.C. v. Virgin Islands PSC*, 2008 WL 5635107 at *2, *3-*12 (D. VI 2008).

[1559] *See* 47 U.S.C. § 252(e)(6); 28 U.S.C. § 1331. *See also, e.g.*, *Midcontinent Commc'ns v. North Dakota PSC*, 2009 WL 3722898 at *5-*9 (D. ND 2009).

[1560] 120 F.2d 753, 802 (8th Cir. 1997) (subsequent history omitted).

[1561] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1998).

[1562] *Id.* at 385.

[1563] *See ICC/USF Transformation NPRM*, 26 FCC Rcd at 4714, paras. 519–20; *see also 2008 ICC/USF NPRM*, 24 FCC Rcd at 6623–26, App. A, paras. 282–90.

[1564] *See supra* Section XII.A (discussing the justification for adopting a bill-and-keep methodology).

petitions seeking to modify or suspend the bill-and-keep provisions we adopt herein. We will monitor state action regarding the reforms we adopt today, and may provide specific guidance for states' review of section 251(f)(2) petitions in the future.

5. The Duty To Negotiate Interconnection Agreements

825. Because we move traffic from the access charge regime to the section 251(b)(5) framework, where payment terms are agreed to pursuant to an interconnection agreement, incumbent LECs have asked the Commission to make clear that they have the ability to compel other LECs and CMRS providers to negotiate to reach an interconnection agreement. This is a concern for incumbent LECs because under sections 251 and 252 of the Act, although LECs and CMRS providers can compel incumbent LECs to negotiate in good faith and invoke arbitration if negotiations fail, incumbent LECs generally lack the ability to compel other LECs and CMRS providers to negotiate for payment for traffic that is not exchanged pursuant to a tariff. In particular, parties have asked the Commission to expand upon the Commission's findings in the 2005 *T-Mobile Order*, which found that incumbent LECs can compel CMRS providers to negotiate to reach an interconnection agreement.

826. After reviewing the record, we conclude it is appropriate to clarify certain aspects of the obligations the Commission adopted in the 2005 *T-Mobile Order*. As a result, in this section, we reaffirm the findings in the *T-Mobile Order* that incumbent LECs can compel CMRS providers to negotiate in good faith to reach an interconnection agreement, and make clear we have authority to do so pursuant to Sections 332, 201, 251 as well as our ancillary authority under 4(i). We also clarify that this requirement does not impose any section 251(c) obligations on CMRS providers, nor does it extend section 252 of the Act to CMRS providers.

827. We decline, at this time, to extend the obligation to negotiate in good faith and the ability to compel arbitration to other contexts. For example, the *T-Mobile Order* did not address relationships involving competitive LECs or among other interconnecting service providers. Subsequently, competitive LECs have requested that the Commission expand the scope of the *T-Mobile Order* and require CMRS providers to negotiate agreements with competitive LECs under the section 251/252 framework, just as they do with incumbent LECs.[1565] In addition, rural incumbent LECs urged the Commission to "extend the T-Mobile Order to give ILECs the right to demand interconnection negotiations with all carriers."[1566] We do not believe the record is currently sufficient to justify doing so, but ask further questions about the policy implications as well as our legal authority to do so in the FNPRM.[1567]

a. Background

828. Regulated intercarrier compensation payments among carriers have been imposed in two basic ways: through tariffs and through carrier-to-carrier agreements. The comprehensive intercarrier compensation reforms we adopt supersede the preexisting access charge regime, bringing that traffic in to the section 251(b)(5) reciprocal compensation framework subject to a transition to bill-and-keep. Under that transitional framework, however, we permit carriers to negotiate alternative intercarrier compensation

[1565] *See, e.g.*, Pac-West Comments at 3; PAETEC et al. Section XV Reply at 23-24; Letter from Michael B. Hazzard, counsel for Xspedius, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, Attach. at 7 (filed Aug. 10, 2005); Supra Telecommunications and Information Systems *Ex Parte* Comments and Cross-Petition for Limited Clarification, CC Docket No. 01-92 at 10 (filed July 14, 2005).

[1566] NECA et al. Section XV Comments at 29 n.67, 30.

[1567] *See infra* para. 1324.

arrangements to the default rates specified in the tariffs.[1568] In addition, the FNPRM seeks comment on the appropriate long-term implementation framework, including whether even the transitional role for tariffing should be replaced, with carriers relying solely on interconnection agreements.[1569]

829. Notably, interconnection, and the associated intercarrier compensation, has evolved since the passage of the 1996 Act in a manner different than originally anticipated. The Act contemplated that competitive carriers would obtain reciprocal compensation arrangements with incumbent LECs by request, leading to negotiation and, if necessary, arbitration.[1570] The 1996 Act included an implementation framework in section 252, which "introduced a mechanism by which CMRS providers may compel LECs to enter into bilateral interconnection arrangements."[1571] The Act also provides specific legal standards for reciprocal compensation that states are required to apply in resolving disputes, and these statutory standards help to define the scope of the obligations in question.[1572] Section 252 also provides that parties may enter into arrangements without regard to these standards, but specifically contemplates that such arrangements would be the product of a negotiation process.[1573] Section 252 did not expressly impose the same obligations on CMRS providers, or other non-incumbent LECs, to ensure payment of the associated intercarrier compensation, however. With respect to intercarrier compensation in particular, experience has not borne out prior views presuming a limited need for regulatory protections for incumbent LECs. In particular, given mandatory interconnection and restrictions on blocking traffic, LECs have been unable to avoid terminating traffic delivered to them even absent a compensation agreement, and experience has shown that even incumbent LECs thus can be at a negotiating disadvantage in particular circumstances.

830. Consequently, the Commission found in the *T-Mobile Order*, terminating LECs had difficulty getting other carriers, such as CMRS providers, to enter into agreements for compensation for non-access traffic absent a legal compulsion for those carriers to do so.[1574] Although certain states, in response, allowed the filing of wireless termination tariffs, the Commission prohibited those on a prospective basis as inconsistent with the framework established in sections 251 and 252 of the Act.[1575] That prohibition of tariffs, standing alone, would have left incumbent LECs with no meaningful way to obtain an arrangement for the receipt of compensation from CMRS providers that complied with the relevant default requirements under the Act and Commission rules. Thus, the *T-Mobile Order* adopted section 20.11(e) of the Commission's rules, which authorizes incumbent LECs to request interconnection and requires CMRS providers to comply with "the negotiation and arbitration procedures set forth in section 252 of the Act."[1576] The *T-Mobile Order* also required CMRS providers to "negotiate in good faith" and follow the Commission's interim transport and termination pricing rules once a request for

[1568] *See supra* Section XII.C (discussion of the transition period).

[1569] *See infra* Section XVII.N (seeking comment on interconnection).

[1570] *See* 47 U.S.C. §§ 251(b)(5), 252(a).

[1571] *T-Mobile Order*, 20 FCC Rcd at 4861, para. 11.

[1572] *See* 47 U.S.C. § 251(b)(5), 252(d)(2).

[1573] 47 U.S.C. § 252(a)(1).

[1574] *T-Mobile Order*, 20 FCC Rcd at 4864, para. 15.

[1575] *T-Mobile Order*, 20 FCC Rcd at 4863-64, para. 14.

[1576] *T-Mobile Order*, 20 FCC Rcd at 4863-65, paras. 14-16. *See also* 47 C.F.R. § 20.11(e).

interconnection is made.[1577]

831. Subsequently, the Rural Cellular Association (RCA) and the American Association for Paging Carriers (AAPC) filed petitions asking the Commission to reconsider certain aspects of the *T-Mobile Order*. RCA argues that the Commission exceeded its authority by directly applying sections 251(c) and 252 of the Act to CMRS carriers.[1578] Specifically, it argues that the Commission cannot require CMRS providers to interconnect directly with ILECs pursuant to section 251(c), or submit to compulsory arbitration pursuant to section 252.[1579] Likewise the American Association of Paging Carriers argues that section 20.11(e) of the Commission's rules is contrary to the Administrative Procedures Act because the Commission failed to give notice of the proposed rule, and that section 20.11(e) contravenes Congressional intent by directly applying section 251(c) to CMRS providers.[1580] In addition, the Commission received several petitions seeking clarification regarding the operation of the *T-Mobile Order* and the state of the law that existed prior to that decision.[1581]

b. Petitions for Reconsideration of the *T-Mobile Order*

832. As described below, we resolve the challenges several parties have made to the Commission's authority to adopt sections 20.11(d) and (e). We conclude that the Commission has both direct and ancillary authority to permit incumbent LECs to request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures of section 252 of the Act. Given this clarification of the Commission's exercise of its authority, we find that these requirements, codified in section 20.11(e) of the Commission's rules, are consistent with the Act. We also conclude that the adoption of those requirements in the *T-Mobile Order* was procedurally proper, and we consequently deny requests to reconsider that rule.

(i) Authority To Adopt Section 20.11(e) of the Commission's Rules

833. In its petition for reconsideration, RCA claims that the Commission lacked authority to adopt section 20.11(e) of the Commission's rules arguing that the Commission cannot directly apply section 251(c) of the Act to CMRS providers by requiring them to interconnect directly with ILECs, or submit to compulsory arbitration pursuant to section 252 of the Act.[1582] RCA misinterprets the nature of the Commission's action in the *T-Mobile Order*, however, viewing it as the direct application of sections 251(c) and 252 to CMRS providers.[1583] Properly understood, the Commission did not apply sections

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[1577] 47 C.F.R. § 20.11(e). The applicable rules for interim transport and termination pricing are found in section 51.715 of the Commission's rules.

[1578] RCA Petition for Clarification or, in the Alternative, Reconsideration, CC Docket No. 01-92 at 2-3 (filed Apr. 29, 2005).

[1579] RCA Petition at 6-10.

[1580] AAPC Petition for Reconsideration, CC Docket No. 01-92 at 4-6 (filed Apr. 29, 2005) (AAPC Petition).

[1581] *See, e.g.*, MetroPCS Petition; Missouri Small Telephone Company Group Petition for Reconsideration, CC Docket No. 01-92 (filed Mar. 25, 2005) (MoSTCG Petition) (seeking clarification that small ILECs may opt in to existing traffic termination arrangements that wireless carriers have with other rural ILECs); T-Mobile USA Petition for Clarification or, in the Alternative, Reconsideration, CC Docket No. 01-92 (filed Apr. 29, 2005) (seeking clarification on the pricing rules that apply during negotiations between wireless carriers and ILECs).

[1582] RCA Petition at 6–10.

[1583] *Id.*

251(c) and 252 in that manner.[1584] Rather, the *T-Mobile Order* obligations imposed on CMRS providers, codified in section 20.11(e) of the Commission's rules, implement the Commission's authority under sections 201 and 332, and are reasonably ancillary to the implementation of our statutorily mandated responsibilities under sections 201, 251(a)(1), 251(b)(5) and 332.

834. *Direct Authority Under Sections 201 and 332.* Sections 201 and 332 of the Act provide a basis for rules allowing an incumbent LEC to request interconnection, including associated compensation, from a CMRS provider and invoke the negotiation and arbitration procedures set forth in section 252 of the Act. Section 332(c)(1)(B) states that "[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service" pursuant to the provisions of section 201 of the Act.[1585] Section 201(a) provides that "every common carrier engaged in interstate or foreign communication by wire or radio" shall: (i) "furnish such communication service upon reasonable request therefore;" and (ii) "in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes."[1586] We have long relied on these provisions to regulate the terms of LEC-CMRS interconnection, including associated compensation.

835. Historically, interconnection requirements imposed under these provisions were understood to encompass not only the technical linking of networks, but also the associated compensation. For example, intercarrier compensation under the access charge regime had, as its origin, the need to "ensur[e] *interconnection* at reasonable rates, as required under Section 201 of the Act, 47 U.S.C. § 201."[1587] Likewise, the Commission previously has specified not only the intercarrier

[1584] *See infra* Section XII.C.5.b(ii).

[1585] 47 U.S.C. § 332(c)(1)(B).

[1586] 47 U.S.C. § 201(a). Although section 201(a) requires an opportunity for hearing, our previous use of notice and comment procedures to satisfy the section 201 hearing requirement was expressly confirmed by the U.S. Court of Appeals for the Third Circuit. *See Bell Telephone Co. v. FCC*, 503 F.2d 1250, 1265 (3rd Cir. 1974) (holding that section 201(a) permits procedures less formal and adversarial than an evidentiary hearing because, among other things, courts have come to favor rulemaking over adjudication for the formulation of new policy), *cert. denied*, 422 U.S. 1026 (1974). As discussed below, the Commission provided notice and received comment here. *See infra* para. 843. Consequently, we reject arguments that the Commission cannot rely on its section 201(a) authority to require interconnection through a rulemaking proceeding. *See, e.g.*, RCA Reply, CC Docket No. 01-92 at 4-5 (filed July 11, 2005). For further discussion of the Commission's authority under sections 332 and 201 to regulate LEC-CMRS intercarrier compensation, *see* Section XV.

[1587] *American Telephone and Telegraph Company and the Bell System Operating Companies Tariff F.C.C. No. 8 (BSOC 8); Exchange Network Facilities for Interstate Access (ENFIA)*, CC Docket No. 78–371, Order on Reconsideration, 93 FCC 2d 739, para. 33 (1983) (emph. added) (adopting certain tariffed charges as "inherently a temporary measure, intended to provide a means of approximating costs that cannot be known with precision until a more permanent access charge system can be put in place"). *See also MTS and WATS Market Structure Inquiry (Phase I)*, 93 FCC 2d 241, paras. 37-39 (1983) (concluding that "[s]ection 201(a) authorizes this Commission to replace the industry-devised contractual arrangement with a Commission-devised formula" and adopting access charge rules); *Investigation of Access and Divestiture Related Tariffs; MTS and WATS Market Structure*, CC Docket No. 83–1145 Phase I, CC Docket No. 78–72 Phase I, Memorandum Opinion and Order, 98 FCC 2d 730 (1984) (holding that "[p]ursuant to 47 U.S.C. §§ 154(i), 201(a), and 205(a), the Commission is authorized to establish charges for carrier interconnections."); *Hawaiian Telephone Company Tariff F.C.C. No. 18, Exchange Network Facilities for Interstate Access Hawaiian Telephone Company Tariff F.C.C. No. 19, Customer Indirect Network Exchange Access Hawaiian Telephone Company Revisions to Tariff F.C.C. No. 11, Foreign Exchange Service*, Memorandum Opinion and Order, 85 FCC 2d 767, para. 6 (Com. Car. Bur. 1981) (observing that "a great deal of (continued…)

compensation required in conjunction with interconnection by, and with, CMRS providers, but also the mechanism for implementing those compensation obligations. Even prior to the adoption of section 332 of the Act, the Commission relied on its section 201 authority to require LECs and CMRS providers to negotiate interconnection agreements in good faith governing the physical interconnections among these carriers, as well as the associated charges.[1588] Following the adoption of section 332, the Commission affirmed that "LECs [must] provide reasonable and fair interconnection for all commercial mobile radio services,"[1589] including "mutual compensation" by each interconnected carrier for "the reasonable costs incurred by such providers in terminating traffic" that originated on the other carrier's facilities.[1590] At that time the Commission retained its then-existing implementation framework, which primarily relied on negotiated agreements with only a limited role expressly identified for tariffing, while observing that this framework would be subject to "review and possible revision."[1591]

836. In the *T-Mobile Order* the Commission built upon the existing rules governing interconnection and compensation for non-access traffic exchanged between LECs and CMRS providers, incorporating the right of incumbent LECs to request interconnection with a CMRS provider, including associated compensation, and adopting an implementation mechanism.[1592] It established obligations surrounding the pre-existing duty both CMRS providers and ILECs have to establish connections between their respective networks, as well as exercising the Commission's authority over the pre-existing tariffing regime. We find, in light of the analysis and precedent above, that these actions are supported by the Commission's authority under sections 201 and 332 of the Act.[1593]

837. *Ancillary Authority.* Ancillary authority also supports the *T-Mobile Order* requirement that CMRS providers comply with the negotiation and arbitration procedures set forth in section 252 of

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attention has been paid to compensation arrangements because of the legal obligation imposed upon local telephone companies under Section 201 of the Communications Act, 47 U.S.C. § 201, to interconnect their local exchange facilities with interstate services . . . . This right to interconnection is limited only by the duty to pay a fair and reasonable sum to the local telephone companies for the service.").

1588 *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Declaratory Ruling, 2 FCC Rcd 2910, 2912-13, paras. 17-21 (1987) (*CMRS Interconnection Declaratory Ruling*).

1589 *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1497-98, para. 230 (1994) (*CMRS Second Report and Order*).

1590 *CMRS Second Report and Order*, 9 FCC Rcd at 1498, para. 232 ("LECs shall compensate CMRS providers for the reasonable costs incurred by such providers in terminating traffic that originates on LEC facilities. Commercial mobile radio service providers, as well, shall be required to provide such competition to LECs in connection with mobile-originated traffic terminating on LEC facilities.").

1591 *CMRS Second Report and Order*, 9 FCC Rcd at 1497, 1498, paras. 229, 235.

1592 *T-Mobile Order*, 20 FCC Rcd at 4864-65 para. 16; 47 C.F.R. § 20.11(e). *See also T-Mobile Order*, 20 FCC Rcd at 4864, para. 15 n.61 (observing that, "given uncertainty as to the relationship between the arrangements contemplated in section 20.11 and the section 251/252 agreements contained in the Act . . . the rights of LECs to compel negotiations with CMRS providers are not entirely clear" and that "although CMRS providers may indeed haven an existing legal obligation to compensate LECs for the termination of wireless traffic under section 20.11(b)(2) . . . the rules fail to specify the mechanism by which LECs may obtain this compensation").

1593 *See, e.g.*, CenturyTel Opposition, CC Docket No. 01-92 at 7 (filed June 30, 2005) (supporting the Commission's authority to adopt the relevant rules pursuant to sections 201 and 332 of the Act); CTIA Opposition, CC Docket No. 01-92 at 2 (filed June 30, 2005) (same); SBC Opposition, CC Docket No. 01-92 at 5 (filed June 30, 2005) (same).